Supreme Court, U.S.
FILED

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No. :

In The
# Supreme Court of the United States

ALLEN MILLER,

*Petitioner*,

v.

STATE OF COLORADO,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Supreme Court Of Colorado**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Should this Court grant certiorari to resolve the conflict among federal and state courts on whether an occupant may give law enforcement valid consent to search the common areas of the premises shared with another, even though the other occupant is present and objects to the search?

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Petitioner, Allen Miller, respectfully prays that a writ of certiorari issue to review the judgment of the Colorado Supreme Court adopting a decision by the Colorado Court of Appeals which held that one occupant of a shared premises may validly consent to a police search of the common areas of those premises even if the other occupant is present and objects to the search. Several States and Federal Circuit Courts of Appeal are split on this issue. The Colorado Supreme Court's decision stands in direct conflict with the decision of the Georgia Supreme Court on which this Court has already granted certiorari. *Georgia v. Randolph*, 73 U.S.L.W. 3473 (U.S. April 18, 2005) (No. 04-1067). This case should be heard as a companion case to the conflicting Georgia case.

## OPINIONS BELOW

The opinion of the Colorado Supreme Court is reported at 2004 WL 1658326 (Colo. Jul 26, 2004) (No. 04SC226), certiorari denied as improvidently granted (Feb 1, 2005), rehearing denied (Feb 22, 2005). The opinion is

reprinted in the Appendix, App. A, *infra*. The original order of the Colorado Supreme Court granting the Petition for Writ of Certiorari is attached in the Appendix, App. B, *infra*. The original order of the Colorado Supreme Court denying the Writ of Certiorari as improvidently granted is attached in the Appendix, App. C, *infra*. The original order of the Colorado Supreme Court denying the Petition for Rehearing concerning the denial of the Writ of Certiorari is attached in the Appendix, App. D, *infra*.

The opinion of the Colorado Court of Appeals is reported at 94 P.3d 1197 (Colo. App. Mar 11, 2004) and is reprinted in the Appendix, App. E, *infra*.

The Order of the Colorado Court of Appeals staying the mandate in this case to allow for the filing of this Petition for Writ of Certiorari with the Supreme Court of the United States is attached in the Appendix, App. F, *infra*.

Petitioner, Allen Miller, respectfully prays that a writ of certiorari issue to review the judgment of the Colorado Supreme Court adopting a decision by the Colorado Court of

Appeals which held that one occupant of a shared premises may validly consent to a police search of the common areas of those premises even if the other occupant is present and objects to the search. Several States and Federal Circuit Courts of Appeal are split on this issue. The Colorado Supreme Court's decision stands in direct conflict with the decision of the Georgia Supreme Court on which this Court has already granted certiorari. *Georgia v. Randolph*, 73 U.S.L.W. 3473 (U.S. April 18, 2005) (No. 04-1067). This case should be heard as a companion case to the conflicting Georgia case.

## JURISDICTION

The Order of the Colorado Supreme Court denying certiorari to the Colorado Court of Appeals was entered on February 22, 2005. The jurisdiction of this Court to review the judgment of the Colorado Supreme Court is invoked under 28 U.S.C. § 1257.

## CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The rights of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## STATEMENT OF THE CASE

On July 15, 1999, based on allegations by Mr. Miller's neighbor, a Denver Police Department detective went to Mr. Miller's home to determine if Mr. Miller had set up a second methamphetamine lab in his home.[1] The

---

[1] This was the Denver Police Department detective's second contact with Mr. Miller. On June 14, 1999, the detective, who suspected that Mr. Miller was manufacturing and dealing methamphetamines but admittedly did not have sufficient information to obtain a search warrant of Mr. Miller's residence, entered Mr. Miller's residence. The detective was in possession of two outstanding warrants for Mr. Miller's arrest for minor traffic violations, but the warrants did not authorize the search of

detective contacted Mr. Miller's outside his house. The detective asked Mr. Miller if he could go into the house to see if there was a methamphetamine lab but Mr. Miller refused to give consent. When the detective stated that he was going to talk to Mr. Miller's common-law wife, Ms. Falbo, Mr. Miller yelled to Ms. Falbo, "Don't let them in. They don't have a warrant." Mr. Miller was then placed in handcuffs and seated inside a police vehicle while the detective approached the door of Mr. Miller's home. Ms. Falbo consented to the search of the residence. The detective entered the home and saw what appeared to be

---

Mr. Miller's residence. Although the detective had previously seen Mr. Miller outside his residence, he waited until he believed Mr. Miller was inside the house. The detective refused the offer of Mr. Miller's common-law wife to get Mr. Miller and proceeded with other officers to the basement, where they arrested Mr. Miller. After the officers saw what they believed to be methamphetamines, the detective obtained a search warrant. As a result of this search, Mr. Miller was charged with several drug and weapons offenses. He was out on bond at the time of the July 15, 1999 incident that gives rise to this Petition.

drugs and drug paraphernalia. The detective then obtained a search warrant and found evidence of methamphetamine manufacture in the basement. Mr. Miller was charged with Manufacturing a Schedule II Controlled Substance, Possession with Intent to Distribute a Schedule II Controlled Substance, Possession of a Schedule II Controlled Substance, and Special Offender – Possession of Deadly Weapon.

During the motions hearing before Mr. Miller's criminal trial, the prosecution argued that Ms. Falbo was authorized to consent to the search even if Mr. Miller had already refused consent. The trial court denied Mr. Miller's motion to suppress evidence from the July 15, 1999 search, holding that Ms. Falbo's "consent was validly given." (Oral Conclusion in Motions Hearing, September 5-6, 2000.)

The Colorado Court of Appeals affirmed Mr. Miller's conviction and the ruling of the trial court that Ms. Falbo's consent to search was valid, stating: "We conclude that defendant's express refusal to consent to a search did not invalidate the search based on the free and voluntary consent

of his wife, a co-occupant of the premises who had joint access and control." *People v. Miller*, 94 P.3d 1197, 1203 (Colo. Ct. App. 2004), *cert. granted*, July 26, 2004 (attached as App. D). The Court cited to an earlier Colorado Supreme Court decision interpreting this Court's decision in *United States v. Matlock* as holding that a defendant does not have "the right to preempt or overrule the consent given by a co-occupant in his or her own right." *Id.*, *citing People v. Sanders*, 904 P.3d 1311 (Colo. 1995), *citing United States v. Matlock*, 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d (1974).

On July 26, 2004, the Colorado Supreme Court granted certiorari to answer the question: "Whether the district court erroneously ruled that a third party can validly consent to a search after the petitioner has expressly refused to consent to such a search." However, the Colorado Supreme Court subsequently denied, without explanation, certiorari as improvidently granted on Feb. 1, 2005. The Court then denied a rehearing of the denial of certiorari, again, without explanation, on February 22, 2005. *Miller v.*

*People*, No. 04SC226, 2004 WL 1658326 (Colo. Feb. 22, 2005) (attached as App. A).

**REASONS FOR ALLOWANCE OF THE WRIT**

"A warrantless entry and search by law enforcement officers does not violate the Fourth Amendment's proscription of 'unreasonable searches and seizures' if the officers have obtained the consent of a third party who possesses common authority over the premises." *Illinois v. Rodriguez*, 497 U.S. 177, 179, 110 S.Ct. 2793, 2796, 111 L.Ed.2d 148 (1990), *citing United States v. Matlock*, 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974). A third party having common authority over premises may consent to a search even though the person with whom authority is shared is absent and does not consent to the search. *Matlock*, 415 U.S. at 170, 94 S.Ct. at 993.

The Supreme Court has never decided whether, as in the present case, the police may obtain consent to search from one occupant with common authority over a premises

when the co-occupant is present and objects to the search, and federal and state courts are split on this issue.

In a footnote in *Matlock*, Justice White elaborated on the rationale underlying the concept of authority to consent:

> Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements, *see Chapman v. United States*, 365 U.S. 610, 81 S.Ct. 776, 5 L.Ed.2d 828 (1961) (landlord could not validly consent to the search of a house he had rented to another), *Stoner v. California*, 376 U.S. 483, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964) (night hotel clerk could not validly consent to search of customer's room) but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

*Matlock*, 415 U.S. at 172, 94 S.Ct. at 993, n. 7.

However, in *Matlock*, the girlfriend of the defendant gave consent <u>in the absence of the defendant</u> for police to search the bedroom she shared with the defendant in her

parents' home. Further, the police officers never asked the defendant for consent to search his bedroom. *Matlock*, 415 U.S. at 166, 94 S.Ct. at 991.

Several courts which have addressed this issue have interpreted *Matlock* as permitting the police to conduct a warrantless search with one cohabitant's consent even when the subject of the search is present and objects. *See, e.g., United States v. Morning,* 64 F.3d 531 (9th Cir. 1995); *Lenz v. Winburn,* 51 F.3d 1540, 1548 (11th Cir. 1995); *United States v. Donlin,* 982 F.2d 31, 33 (1st Cir. 1992); *United States v. Hendrix,* 595 F.2d 883, 885 (D.C. Cir. 1979); *United States v. Sumlin,* 567 F.2d 684, 687 (6th Cir. 1977); *Love v. State,* 138 S.W.3d 676 (Ark. 2003); *United States v. Garcia,* 57 M.J. 716 (2002); *Commonwealth v. Ploude,* 688 N.E.2d 1028 (Mass. App. Ct. 1998); *People v. Sanders,* 904 P.2d 1311 (Colo. 1995) (en banc); *Laramie v. Hysong,* 808 P.2d 199 (Wyo. 1991); *People v. Callaway,* 522 N.E.2d 337 (Ill. App. 1988); *State v. Santana,* 521 A.2d 346 (N.J. Super.

Ct. 1987); *People v. Haskett,* 640 P.2d 776, 785 (Cal. 1982); *People v. Cosme,* 397 N.E.2d 1319 (N.Y. 1979).

In contrast, the Georgia Supreme Court held that if a cohabitant is present and can object, police should also obtain the cohabitant's consent before a search may ensue. *State v. Randolph*, 604 S.E.2d 835 (Ga. 2004). Three other states have ruled similarly to the Georgia Supreme Court in *Randolph*, holding that if a cohabitant is present and can object, police must obtain the cohabitant's consent before a search may ensue. *See In Re D.A.G.*, 484 N.W.2d 787 (Minn. 1992); *State v. Leach*, 782 P.2d 1035 (Wash. 1989); *Silva v. State*, 344 So.2d 559 (Fla. 1977). The rationale in those cases is that, by being present, the occupant has not assumed that a third party will vicariously waive his or her Fourth Amendment rights.

Defendant Allen Miller urges this Court to grant certiorari to resolve this conflict among the state and federal courts on the important issue of consent. Mr. Miller asks the Court to note further the directly opposite holding of the

Georgia Supreme Court on this issue to which this Court has already granted certiorari, making this an ideal companion case for the Court's consideration.

## CONCLUSION

WHEREFORE, for all of the foregoing reasons, Defendant Allen Miller prays that this Court grant a writ of certiorari to review the decision of the Colorado Supreme Court as the decision presents a Fourth Amendment question of paramount importance not previously decided by this Court and on which the states are in conflict.

Respectfully submitted this 8TH day of June, 2005.

**BENEZRA & CULVER, L.L.C.**

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## CERTIFICATE OF MAILING

I hereby certify that on the 10TH day of June, 2005, I sent the foregoing by hand delivery to the following:

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**Westlaw**
**Not Reported in P.3d**
**2004 WL 1658326 (Colo.)**
**(Cite as: 2004 WL 1658326 (Colo.))**

**H**

**Briefs and Other Related Documents**

Only the Westlaw citation is currently available.

Supreme Court of Colorado,
En Banc.
**Allen MILLER**, Petitioner,
v.
The **PEOPLE** of the State of Colorado, Respondent.
**No. 04SC226.**

July 26, 2004.
Certiorari Denied as Improvidently Granted Feb. 1, 2005.
Rehearing of Feb. 1, 2005 Order Denied Feb. 22, 2005.

Court of Appeals Case No. 02CA0850 (3/11/04).

***1** Petition for Writ of Certiorari GRANTED.

Justice COATS does not participate.

*Summary of Issues:*

Whether the district court erroneously ruled that a third party can validly consent to a search after the petitioner has expressly refused to consent to such a search.

Whether the district court erroneously failed to determine that a reasonable narcotics officer in the particular

circumstances of this case would not have arrested the petitioner for outstanding traffic warrants absent an illegitimate motive.

DENIED AS TO ALL OTHER ISSUES.

2004 WL 1658326 (Colo.)

**Briefs and Other Related Documents (Back to top)**

• 2004 WL 3133803 (Appellate Brief) Petitoner's Rply Brief (Dec. 09, 2004)Original Image of this Document (PDF)

• 2004 WL 3095310 (Appellate Brief) Respondent's Answer Brief (Nov. 26, 2004)Original Image of this Document (PDF)

• 2004 WL 2477615 (Appellate Brief) Petitioner's Opening Brief (Oct. 07, 2004)Original Image of this Document (PDF)

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SUPREME COURT, STATE OF COLORADO
TWO EAST 14TH AVENUE
DENVER, COLORADO 80203

CERTIORARI TO THE COURT OF APPEALS, 02CA0850
DISTRICT COURT, CITY & COUNTY OF DENVER,
99CR2558 & 99CR2783

CASE NO. 04SC226

**Petitioner:**

ALLEN MILLER,

v.

**Respondent:**

THE PEOPLE OF THE STATE OF COLORADO.

**ORDER OF COURT**

Upon consideration of the Petition for Writ of Certiorari filed in the above cause, and now being sufficiently advised in the premises,

IT IS ORDERED that said Petition shall be, and the same hereby is, GRANTED as to the issues set forth below, and the briefs shall be filed as follows:

(a) Petitioner's Opening Brief shall be filed within forty days from this date;

(b) Respondent's Answer Brief shall be filed within thirty days from receipt of the Opening Brief;

(c) Petitioner's Reply Brief may be filed within fourteen days from receipt of the Answer Brief.

Pursuant to C.A.R. 54(a), the record on file will be treated as though sent up in response to a formal writ.

The issues as announced by the Court this day are as follows:

Whether the district court erroneously ruled that a third party can validly consent to a search after the petitioner has expressly refused to consent to such a search.

Whether the district court erroneously failed to determine that a reasonable narcotics officer in the particular circumstances of this case would not have arrested the petitioner for outstanding traffic warrants absent an illegitimate motive.

DENIED AS TO ALL OTHER ISSUES.

BY THE COURT, EN BANC, JULY 26, 2004. (SEAL)

Copies mailed via the State's Mail Services Division on 07/26/04 HOP

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CERTIORARI TO THE COURT OF APPEALS, 02CA0850
DISTRICT COURT, CITY & COUNTY OF DENVER,
99CR2558 & 99CR2783

CASE NO. 04SC226

**Petitioner:**

ALLEN MILLER,

v.

**Respondent:**

THE PEOPLE OF THE STATE OF COLORADO.

**ORDER OF COURT**

Upon consideration of the Record on Appeal, together with the Written and Oral Arguments of Counsel, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that the Writ of Certiorari heretofore granted be, and is, DENIED as having been improvidently granted.

BY THE COURT, EN BANC, FEBRUARY 1, 2005.
(SEAL)

Copies mailed via the State's Mail Services Division on 02-04-05 EAC.

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CERTIORARI TO THE COURT OF APPEALS, 02CA0850
DISTRICT COURT, CITY & COUNTY OF DENVER,
99CR2558 & 99CR2783

CASE NO. 04SC226

**Petitioner:**

ALLEN MILLER,

v.

**Respondent:**

THE PEOPLE OF THE STATE OF COLORADO.

**ORDER OF COURT**

Upon consideration of the Petition for Rehearing concerning this Court's order of February 01, 2005 denying the Writ of Certiorari as having been Improvidently Granted, filed in the above cause, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Petition for Rehearing shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, FEBRUARY 22, 2005.

JUSTICE BENDER and JUSTICE COATS do not participate.

(SEAL)

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**Westlaw**
**94 P.3d 1197**
**(Cite as: 94 P.3d 1197)**

Colorado Court of Appeals,
Div. II.
The PEOPLE of the State of Colorado, Plaintiff-Appellee,
v.
Allen MILLER, Defendant-Appellant.
**No. 02CA0850.**

March 11, 2004.
Certiorari Granted July 26, 2004. [FN*]

FN* Justice COATS does not participate.

**Background:** Defendant was convicted in the District Court, Denver County, Lawrence A. Manzanares, J., of two counts of manufacturing a schedule II controlled substance, two counts of possession with intent to distribute a schedule II controlled substance, two counts of possession of a schedule II controlled substance, and five special offender counts. Defendant appealed.

**Holdings:** The Court of Appeals, Nieto, J., held that:
(1) defendant's arrest pursuant to warrant was not pretextual and, under objective standard, warrant provided police with probable cause to arrest defendant;
(2) evidence did not support finding that officer forced an entry into defendant's residence while executing an arrest warrant for defendant, and thus "knock and announce" requirement was inapplicable;
(3) evidence supported finding that consent given by defendant's wife to search defendant's residence was voluntarily given; and
(4) as an issue of first impression, defendant's express refusal to consent to search of residence he occupied with

wife did not invalidate search of residence based on free and voluntary consent of wife.
Affirmed.

West Headnotes

**[1] Arrest 65**
35k65 Most Cited Cases
Defendant's arrest pursuant to warrant was not pretextual and, under objective standard, warrant provided police with probable cause to arrest defendant. U.S.C.A. Const.Amend. 4.

**[2] Searches and Seizures 47.1**
349k47.1 Most Cited Cases
One exception to the search warrant requirement is the discovery of evidence in plain view to an officer who is validly on the premises. U.S.C.A. Const.Amend. 4.

**[3] Searches and Seizures 120**
349k120 Most Cited Cases
Evidence in plain view may form the basis for probable cause to obtain a search warrant. U.S.C.A. Const.Amend. 4.

**[4] Arrest 65**
35k65 Most Cited Cases
An outstanding arrest warrant provides probable cause to arrest the person named in the warrant. U.S.C.A. Const.Amend. 4.

**[5] Arrest 68(12)**
35k68(12) Most Cited Cases
Police officers may enter a suspect's home to arrest him or her when they have an arrest warrant and have reason to believe the suspect is within. U.S.C.A. Const.Amend. 4.

**[6] Automobiles 349.5(3)**

48Ak349.5(3) Most Cited Cases
Where a defendant is detained for a traffic violation and the police officer develops probable cause to search the vehicle, the officer's ulterior motive for the search does not invalidate it. U.S.C.A. Const.Amend. 4.

**[7] Criminal Law 1224(1)**
110k1224(1) Most Cited Cases
Otherwise lawful conduct by law enforcement officers is not made illegal or unconstitutional merely because the officers' subjective intent is illegitimate.

**[8] Searches and Seizures 23**
349k23 Most Cited Cases
The validity of a search must be determined by an objective analysis of the circumstances supporting probable cause for the search and not upon the subjective intent of the officer. U.S.C.A. Const.Amend. 4.

**[9] Arrest 68(4)**
35k68(4) Most Cited Cases

**[9] Automobiles 349(10)**
48Ak349(10) Most Cited Cases
An arrest on a warrant and a temporary detention during a traffic stop are both "seizures" under the Fourth Amendment. U.S.C.A. Const.Amend. 4.

**[10] Arrest 68(12)**
35k68(12) Most Cited Cases
Evidence did not support finding that officer forced an entry into defendant's residence while executing an arrest warrant for defendant, and thus "knock and announce" requirement was inapplicable; evidence indicated that officer knocked on defendant's door, that defendant's wife answered, that officer entered and identified himself as a police officer and asked whether defendant was there, that defendant's wife told the

officer that defendant was there and offered to go get him. U.S.C.A. Const.Amend. 4.

**[11] Searches and Seizures 36.1**
349k36.1 Most Cited Cases
A lawful search must be preceded by a lawful entry into the premises to be searched. U.S.C.A. Const.Amend. 4.

**[12] Arrest 68(11)**
35k68(11) Most Cited Cases

**[12] Searches and Seizures 143.1**
349k143.1 Most Cited Cases
When executing a search or arrest warrant, police officers must identify themselves and their purpose prior to a forced entry, unless an exception applies. U.S.C.A. Const.Amend. 4.

**[13] Arrest 68(11)**
35k68(11) Most Cited Cases

**[13] Searches and Seizures 143.1**
349k143.1 Most Cited Cases
The "knock and announce" requirement is applicable to the execution of a search or arrest warrant only if the police conduct constituted a forced entry. U.S.C.A. Const.Amend. 4.

**[14] Criminal Law 1158(1)**
110k1158(1) Most Cited Cases
An appellate court must accept the trial court's factual findings if they are supported by the record.

**[15] Searches and Seizures 181**
349k181 Most Cited Cases
Evidence supported finding that consent given by defendant's wife to search defendant's residence was voluntarily given;

wife was a co-occupant of residence, wife had signed a consent to search form, and officer testified that while obtaining consent from defendant's wife, he did not make any threats or promises to her, demand to be allowed in the house, or draw his gun. U.S.C.A. Const.Amend. 4.

**[16] Searches and Seizures 171**
349k171 Most Cited Cases
A warrantless search is constitutionally justified when it is conducted pursuant to voluntary consent. U.S.C.A. Const.Amend. 4.

**[17] Searches and Seizures 180**
349k180 Most Cited Cases
Consent to search is voluntary if it is the product of an essentially free and unconstrained choice and not the result of circumstances that overbear the consenting party's will. U.S.C.A. Const.Amend. 4.

**[18] Searches and Seizures 197**
349k197 Most Cited Cases
Prosecution bears the burden of proving by clear and convincing evidence that a person's consent to search was voluntarily given. U.S.C.A. Const.Amend. 4.

**[19] Searches and Seizures 180**
349k180 Most Cited Cases
Before a court may conclude that consent to search was voluntarily given, it must find no objective evidence of coercion, duress, deception, promises, threats, intrusive conduct, or other undue influence by the police that critically impaired the person's judgment. U.S.C.A. Const.Amend. 4.

**[20] Searches and Seizures 180**
349k180 Most Cited Cases
If there is objective evidence of coercive police conduct in obtaining consent to search, court should then consider the

person's subjective characteristics and whether the police conduct could reasonably have appeared to be coercive. U.S.C.A. Const.Amend. 4.

**[21] Searches and Seizures 178**
349k178 Most Cited Cases
Defendant's express refusal to consent to search of residence he occupied with wife did not invalidate search of residence based on the free and voluntary consent of wife. U.S.C.A. Const.Amend. 4.

**[22] Searches and Seizures 173.1**
349k173.1 Most Cited Cases
A valid consent to search may be given by a defendant or by another person with common authority over the premises to be searched. U.S.C.A. Const.Amend. 4.

**[23] Searches and Seizures 173.1**
349k173.1 Most Cited Cases
Common authority over a place to be searched rests on mutual use of the property by persons generally having joint access or control for most purposes. U.S.C.A. Const.Amend. 4.

**[24] Searches and Seizures 173.1**
349k173.1 Most Cited Cases
The valid consent of a person with common authority will justify a warrantless search of a residence despite the physical presence of a nonconsenting co-occupant. U.S.C.A. Const.Amend. 4.

**[25] Searches and Seizures 173.1**
349k173.1 Most Cited Cases
The authority of a co-occupant to consent to a search is based on the co-occupant's privilege in his or her own right to permit a search of premises over which he or she has a joint right of access and control. U.S.C.A. Const.Amend. 4.

**[26] Criminal Law 1586**
110k1586 Most Cited Cases
Defendant's challenge to his two prior Colorado convictions used in habitual criminal proceeding was time-barred. West's C.R.S.A. § 16-5-402.

**[27] Criminal Law 1086.4**
110k1086.4 Most Cited Cases
It is the defendant's responsibility to designate the necessary record on appeal, and any facts not appearing in the record cannot be reviewed, and the presumption is that material portions omitted from the record would support the judgment.
***1199** Ken Salazar, Attorney General, Rebecca A. Adams, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee.

Suzan Trinh Almony, Broomfield, Colorado, for Defendant-Appellant.

***1200** Opinion by Judge NIETO.

Defendant, Allen Miller, appeals the judgment of conviction entered on jury verdicts finding him guilty of two counts of manufacturing a schedule II controlled substance, two counts of possession with intent to distribute a schedule II controlled substance, two counts of possession of a schedule II controlled substance, and five special offender counts, and the trial court's adjudication of six habitual criminal counts. We affirm.

While investigating defendant for illegal drug activity, a police officer discovered two active arrest warrants for defendant arising out of a misdemeanor case and a traffic case. The officer, in the company of fellow officers, entered defendant's home to arrest him on the two warrants. While

there, the officer saw evidence of a methamphetamine laboratory in plain view. The officers secured the premises, and one officer left to obtain a search warrant. Defendant was taken into custody, but was later released on bond.

A month after the arrest, the investigating officer received information that defendant had set up a new methamphetamine laboratory in his home. The officer returned to defendant's home and asked defendant for consent to search. Defendant refused, but defendant's wife, who was a co-occupant of the home, consented to the search. While the officer was obtaining consent from defendant's wife, he noticed drug paraphernalia in plain view on the coffee table. As a result, the officer secured the house, obtained a search warrant, searched the house, and arrested defendant again.

Charges arising out of both incidents were combined for trial, and defendant was found guilty of the above offenses.

I.

[1] Defendant first contends the court erred in denying his motion to suppress evidence discovered during the execution of the two arrest warrants. Defendant argues that the arrest was an impermissible pretext to search his home for suspected drug activity. We disagree.

[2][3] One exception to the search warrant requirement is the discovery of evidence in plain view to an officer who is validly on the premises. Evidence in plain view may form the basis for probable cause to obtain a search warrant. *People v. Clements,* 661 P.2d 267 (Colo.1983).

[4][5] An outstanding arrest warrant provides probable cause to arrest the person named in the warrant. *People v. Thompson,* 793 P.2d 1173 (Colo.1990). Police officers may enter a suspect's home to arrest him or her when they have an

arrest warrant and have reason to believe the suspect is within. *People v. Dotson,* 55 P.3d 175 (Colo.App.2002).

[6][7][8] Where a defendant is detained for a traffic violation and the police officer develops probable cause to search the vehicle, the officer's ulterior motive for the search does not invalidate it. *Whren v. United States,* 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996). "[O]therwise lawful conduct by law enforcement officers is not made illegal or unconstitutional merely because the officers' subjective intent is illegitimate." *People v. Altman,* 938 P.2d 142, 146 (Colo.1997). The validity of the search must be determined by an objective analysis of the circumstances supporting probable cause for the search and not upon the subjective intent of the officer. *People v. Altman, supra; People v. Rodriguez,* 945 P.2d 1351 (Colo.1997).

[9] Here, the officer had two warrants for defendant's arrest, and he had reason to believe defendant was in the residence. We can perceive no reason to analyze a plain view search incident to an arrest upon a warrant in a manner more restrictive then a search based upon probable cause developed after a traffic stop. An arrest on a warrant and a temporary detention during a traffic stop are both seizures under the Fourth Amendment. *Delaware v. Prouse,* 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979).

Therefore, we hold that the validity of such a search must be determined by an objective analysis of the validity of the arrest warrant and the circumstances of its execution and not by an analysis of the officer's motives for executing the warrant.

Defendant argues that the correct test to determine whether the arrest was pretextual is the "reasonable officer" test articulated in *People v. Hauseman,* 900 P.2d 74 (Colo.***1201** 1995). However, *Whren, Altman,* and *Rodriguez* all reject

this test in favor of an objective analysis of the circumstances giving rise to probable cause to arrest.

Further, *Hauseman* is distinguishable because it involved an inventory search. The Supreme Court in *Whren* recognized a clear distinction between inventory and administrative searches, which do not require probable cause, and searches based on probable cause.

Defendant does not dispute that the warrants were valid, and, except as discussed below, he does not challenge the manner in which they were executed. Because the officer had valid warrants for defendant's arrest and no basis exists for challenging the manner of execution, the officer's motives have no bearing on the validity of the plain view search incident to defendant's arrest. Therefore, the officer properly used the information gained in the plain view search to obtain a search warrant.

Accordingly, we conclude that, based on this argument, the trial court correctly denied the motion to suppress.

II.

[10] Defendant next contends that the court erred in denying his motion to suppress because the police officer did not identify himself and announce his intentions prior to a forced entry into the residence. We disagree.

[11][12][13] A lawful search must be preceded by a lawful entry into the premises to be searched. When executing a warrant, police officers must identify themselves and their purpose prior to a forced entry, unless an exception applies. However, the "knock and announce" requirement is applicable only if the police conduct constituted a forced entry. *People v. Gifford,* 782 P.2d 795, 797 (Colo.1989).

No forced entry occurs when a police officer, in possession

of a valid search warrant, rings the doorbell and merely steps across the threshold of a house in a nonviolent and nonforceful manner before identifying himself and his purpose of executing a warrant. *People v. Campbell,* 185 Colo. 312, 524 P.2d 73 (1974). Further, police officers, in possession of a valid arrest warrant, who peacefully open a door and enter a house in response to an invitation from within, do not effectuate a forced entry. *People v. Towery,* 194 Colo. 486, 573 P.2d 104 (1978).

Here, the trial court found that an officer knocked on the door, defendant's wife answered, and the officers entered. The officer testified that he identified himself as a police officer and asked whether defendant was there. The court found that defendant's wife told the officer that defendant was there and offered to go get him. The court also found that the officer responded, "no, we'll get him ourselves," and then he entered and arrested defendant. These findings do not support a conclusion that the officer forced an entry into the home.

[14] We must accept the trial court's factual findings if they are supported by the record, as they are here. *People v. Perea,* 74 P.3d 326 (Colo.App.2002). The trial court did not make a specific finding that the officers did not effectuate a forced entry, but it found that the manner of executing the warrant was proper. Because the factual findings permit no other conclusion, we conclude there was no forced entry and the "knock and announce" requirement was inapplicable.

III.

[15] Defendant next contends the court erred in finding the consent to search given by his wife was voluntary because the court did not consider her particular characteristics when evaluating the circumstances in which the consent was given. We disagree.

[16][17][18][19][20] A warrantless search is constitutionally justified when it is conducted pursuant to voluntary consent. Consent to search is voluntary if it is the product of an essentially free and unconstrained choice and not the result of circumstances that overbear the consenting party's will. The prosecution bears the burden of proving by clear and convincing evidence that a person's consent to search was voluntarily given. Before a court may conclude that consent was voluntarily given, it must find no objective evidence of coercion, duress, deception, promises, threats, intrusive conduct, or other undue influence by the police that ***1202** critically impaired the person's judgment. If there is objective evidence of coercive police conduct, the court should then consider the person's subjective characteristics and whether the police conduct could reasonably have appeared to be coercive. *People v. Magallanes-Aragon,* 948 P.2d 528 (Colo.1997).

At the hearing, an officer testified that while obtaining consent from defendant's wife, he did not make any threats or promises to her, demand to be allowed in the house, or draw his gun. A written consent to search form signed by defendant's wife and a handwritten statement signed by her were admitted into evidence. The written statement was signed several months after the search and stated that she had consented to the search without any intimidation by the police.

Defendant's wife testified at the suppression hearing that she gave consent under duress caused by threats from the officer and her forcible removal from the home. Another witness also testified that the wife was forcibly removed from the house.

The trial court considered all this evidence and specifically rejected the evidence of force and threats. It found the testimony of defendant's wife to be incredible. It then found

that the consent to search had been freely and voluntarily given.

Because the trial court found no credible objective evidence of coercive police conduct, there was no need to consider the particular characteristics of defendant's wife. *See People v. Johnson,* 865 P.2d 836 (Colo.1994)(in the absence of evidence of coercive police conduct, trial court's finding of voluntary consent should not be disturbed).

Accordingly, we will not disturb the trial court's finding that defendant's wife voluntarily consented to the search of her home. *See People v. Stark,* 691 P.2d 334 (Colo.1984)(appellate court will not substitute its judgment as to the weight of evidence and credibility of witness for that of the trial court).

IV.

[21] Defendant next contends that a co-occupant of his home may not validly consent to a search after he had expressly refused consent to search. We disagree.

[22][23][24] One of the exceptions to the requirement of a valid search warrant is a search conducted pursuant to consent freely and voluntarily given. A valid consent may be given by a defendant or by another person with common authority over the premises to be searched. Common authority rests on mutual use of the property by persons generally having joint access or control for most purposes. This joint access makes it reasonable to conclude that any of the co-inhabitants has the right to permit an inspection and that the co-inhabitants have assumed the risk that one of them might permit the common area to be searched. "The valid consent of a person with 'common authority' will justify a warrantless search of a residence despite the physical presence of a nonconsenting co-occupant." *People v. Sanders,* 904 P.2d 1311, 1313 (Colo.1995).

Here, defendant does not dispute that his wife had common authority over the premises. Rather, he argues that her consent could not override his express refusal. We disagree.

Although Colorado courts have never ruled on this issue, other jurisdictions have found that a co-occupant's consent was valid despite the defendant's refusal to grant consent. *United States v. Morning,* 64 F.3d 531 (9th Cir.1995)(a consent to search by a co-occupant is valid against a defendant when both are at the scene, and the defendant has refused consent); *Lenz v. Winburn,* 51 F.3d 1540, 1548 (11th Cir.1995)(third party with common authority can consent, "even when a present subject of the search objects"); *United States v. Donlin,* 982 F.2d 31 (1st Cir.1992); *J.L. Foti Constr. Co. v. Donovan,* 786 F.2d 714, 716-17 (6th Cir.1986); *United States v. Baldwin,* 644 F.2d 381 (5th Cir.1981); *United States v. Hendrix,* 595 F.2d 883 (D.C.Cir.1979); *United States v. Sumlin,* 567 F.2d 684 (6th Cir.1977); *State v. Ramold,* 2 Neb.App. 545, 511 N.W.2d 789 (1994); *People v. Cosme,* 48 N.Y.2d 286, 422 N.Y.S.2d 652, 397 N.E.2d 1319 (1979).

The rationale behind permitting a co-occupant to consent to a warrantless search is that "a joint occupant assumes the risk of his ***1203** exposing their common private areas to such a search." *United States v. Sumlin, supra,* 567 F.2d at 688. Thus, a defendant's refusal to consent in no way lessens this assumed risk. "Although there is always the fond hope that a co-occupant will follow one's known wishes, the risks remain. A defendant cannot expect sole exclusionary authority unless he lives alone, or at least has a special and private space within the joint residence." *United States v. Morning, supra,* 64 F.3d at 536.

We find support for this rationale in *People v. Sanders, supra.* There, the court held that a search based on the

consent of a co-occupant was valid despite the physical presence of the defendant, who was also a co-occupant and who did not consent. The court relied on the assumption of the risk rationale and stated, "the rationale is not dependent upon the defendant's consent or non-consent to the search." *People v. Sanders, supra,* 904 P.2d at 1315.

[25] The authority of a co-occupant to consent to a search is based on the co-occupant's privilege in his or her own right to permit a search of premises over which he or she has a joint right of access and control. *People v. Sanders, supra* (citing *United States v. Matlock,* 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974)). Thus, the fact that the search is focused on discovering information about a defendant does not give the defendant the right to preempt or overrule the consent given by a co-occupant in his or her own right. For the same reasons, after the court has determined that the co-occupant has joint access to, and control over, the premises to be searched, there is no need for the court to weigh the relative strengths of the defendant's and the co-occupant's privacy interests.

Accordingly, we conclude that defendant's express refusal to consent to a search did not invalidate the search based on the free and voluntary consent of his wife, a co-occupant of the premises who had joint access and control.

V.

[26] Finally, defendant contends that the trial court erred in finding that his challenge to two prior Colorado convictions used in the habitual criminal proceeding was time barred by § 16-5-402, C.R.S.2003. We perceive no error.

Defendant's sole argument is that he timely challenged these convictions in the courts that entered them, and therefore, the time bar should not apply in this case. However, the record on appeal does not show any information relating to

postjudgment proceedings in the courts that entered the convictions.

[27] It is the defendant's responsibility to designate the necessary record on appeal. Any facts not appearing in the record cannot be reviewed, and the presumption is that material portions omitted from the record would support the judgment. *People v. Wells,* 776 P.2d 386 (Colo.1989). Because defendant failed to include documentation concerning these alleged timely challenges, we must presume that the omitted portions of the record support the trial court's judgment, and therefore, the court properly considered the two Colorado convictions.

Defendant also challenges three of the Louisiana felony convictions used in the habitual criminal proceeding, but he raises no challenge to a fourth Louisiana felony conviction. We need not consider defendant's challenge because the unchallenged Louisiana conviction together with the two Colorado convictions referred to above justify defendant's sentence under § 18-1.3- 801(2), C.R.S.2003, which requires only three prior felony convictions to impose habitual criminal sentencing. Vacating the finding of additional convictions would have no effect on defendant's sentence. *See People v. McMurrey,* 39 P.3d 1221 (Colo.App.2001)(an issue on appeal is moot when the relief, if granted, would have no practical effect on the controversy).

Therefore, we conclude that defendant was properly sentenced as a habitual criminal under § 18-1.3-801(2).

VI.

We have considered defendant's contentions relating to the admission of evidence, ***1204** and we perceive no error in the trial court's rulings.

The judgment is affirmed.

Judge PICCONE and Justice ERICKSON [FN**] concur.

FN** Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3) and § 24-51-1105, C.R.S.2003.

94 P.3d 1197

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COURT OF APPEALS, STATE OF COLORADO
2 East 14th Avenue
Denver, CO 80203

CASE NO. 02CA0850

THE PEOPLE OF THE STATE OF COLORADO,
Plaintiff-Appellee,

v.

ALLEN MILLER,
Defendant-Appellant.

Supreme Court, State of Colorado
Case Number 04SC226

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MARCH 22, 2005
Mandated stayed 60 days. Further stays should be sought in the U.S. Supreme Court. (handwritten)
By the Court
Davidson, CJ
Colorado Court of Appeals (initials pb/sa)

**MOTION TO STAY MANDATE**

Defendant-Appellant, Allen Miller, through his counsel, Suzan Trinh Almony, hereby moves this Court to stay the mandate in the above captioned matter. In support of this motion, the Defendant states the following:

1. On March 11, 2004, this Court of Appeals affirmed the trial court judgment in this matter in a published opinion;
2. On April 20, 2004, the defendant-appellant filed a Petition for Writ of Certiorari in the Colorado Supreme Court;
3. On July 26, 2004, the Colorado Supreme Court granted the Petition for Writ of Certiorari;
4. The Colorado Supreme Court subsequently accepted Briefs and conducted Oral Arguments in this matter;
5. On February 1, 2005, the Colorado Supreme Court issued an Order denying the Writ of Certiorari as having been improvidently granted;

* * *

Supreme Court, U.S.
FILED
AUG 24 2005
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(2)

NO. 04-1679

# IN THE SUPREME COURT OF THE UNITED STATES

*ALLEN MILLER,*

**Petitioner,**

vs.

*STATE OF COLORADO,*

**Respondent.**

On Petition For A Writ Of Certiorari To
The Colorado Court of Appeals

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Should this Court should grant certiorari to decide whether a third party may give law enforcement valid consent to search premises shared with another when the other occupant is present and expressly objects to the search?

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## STATEMENT OF THE CASE AND FACTS

On July 15, 1999, based on information provided by Allen Miller's neighbors, a detective went to Miller's home to investigate whether he had set up a new methamphetamine laboratory in the home. The detective contacted Miller outside his house and asked him for consent to search the house. Miller refused. When the detective told Miller he was going to talk to Miller's wife, Miller began yelling at his wife. As a result, Miller was handcuffed and asked to remain seated. The detective then approached the house and contacted Miller's wife, who consented to the search. While the detective was obtaining consent, he observed drugs and drug paraphernalia on the coffee table. As a result, the detective arrested Miller, and he was seated inside a police vehicle. The detective then secured the house and left to obtain a search warrant. During the ensuing search, the detective discovered evidence of a methamphetamine laboratory and various drugs in Miller's home.

Miller was charged with manufacturing a schedule II controlled substance (methamphetamine), possession with intent to distribute a schedule II controlled substance (methamphetamine), possession of a schedule II controlled substance (methamphetamine), and numerous special offender counts as well as six habitual criminal counts.

Miller filed a motion to suppress evidence, arguing that the search was the product of an illegal arrest and was executed without his consent. Miller also argued that his wife's consent was not voluntary. Following a hearing, the trial court denied the motion, finding that Miller's wife

validly consented to the search of the house. Following a jury trial, Miller was convicted as charged.

The Colorado Court of Appeals affirmed Miller's convictions and the ruling of the trial court, holding that the "defendant's express refusal to consent to a search did not invalidate the search based on the free and voluntary consent of his wife, a co-occupant of the premises who had joint access and control." *People v. Miller*, 94 P.3d 1197, 1203 (Colo. App. 2004).

The Colorado Supreme Court granted certiorari on July 26, 2004, to decide "[w]hether the district court erroneously ruled that a third party can validly consent to a search after the petitioner has expressly refused to consent to such a search." However, on February 1, 2005, after briefing and argument, the Colorado Supreme Court denied certiorari as improvidently granted, and on February 22, 2005, the court denied Miller's petition for rehearing on the denial of certiorari. *Miller v. People*, No. 04SC226, 2004 WL 1658326 (Colo. Feb. 22, 2005).

**REASONS FOR DENYING THE WRIT**

Miller contends that a writ of certiorari is appropriate in this case because this Court granted certiorari in *State v. Randolph*, 604 S.E.2d 835 (Ga. 2004), *cert. granted*, 125 S.Ct. 1840 (U.S. Apr. 18, 2005) (No. 04-1067), to address the same issue presented here. This case is not factually distinct from *Randolph*. Therefore, the petition for certiorari should be held pending this Court's decision in *Randolph*. If this Court reverses the decision below in *Randolph*, thus adopting the position of the Colorado Court of Appeals in this case, the petition for certiorari should be denied.

The Colorado Court of Appeals correctly determined that the search in this case was proper. The Fourth Amendment to the United States Constitution protects citizens against unreasonable searches and seizures by law enforcement. U.S. Const. amend. IV. Generally, a warrant is required to enter or search a home. *Payton v. New York*, 445 U.S. 573, 586 (1980). However, "a warrantless entry and search by law enforcement officers does not violate the Fourth Amendment's proscription of 'unreasonable searches and seizures' if the officers have obtained the consent of a third party who possesses common authority over the premises." *Illinois v. Rodriguez*, 497 U.S. 177, 179 (1990) (citing *United States v. Matlock*, 415 U.S. 164, 171 (1974)).

In *Matlock*, this Court held that consent is valid when "permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." 415 U.S. at 171. This Court explained:

> Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinement, but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that *it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own*

> *right and that the others have assumed the risk that one of their number might permit the common area to be searched.*

415 U.S. at 171 n.7 (citations omitted) (emphasis added). While the facts presented in *Matlock*, as discussed below, differ slightly from those in the present case, the reasoning of *Matlock* is equally relevant and was properly applied by the Colorado Court of Appeals to the facts presented here.

Police officers arrested Matlock in his front yard, and although the officers knew that Matlock lived in the house, they did not ask him which bedroom was his or whether he would consent to a search of the home. Instead, the police requested consent to search the home from Matlock's housemate, and she agreed. While searching the bedroom Matlock shared with his housemate, the officers discovered and seized a large amount of cash. This Court upheld the search, reasoning that the police obtained voluntary consent from a person with common authority:

> [W]hen the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.

*Matlock*, 415 U.S. at 171.

*Matlock* did not turn on the defendant's presence or absence, or his consent or nonconsent, but rather his assumption of the risk and the third party's right to consent. The rationale of *Matlock* is that a co-occupant assumes the risk that another occupant may expose common areas to a search. Under such circumstances, "[t]here is no reasonable expectation of privacy to be protected." *United States v. Sumlin*, 567 F.2d 684, 688 (6th Cir. 1977).

The additional fact that the respondent in this case expressly refused to consent in no way lessened the risk that his wife would consent. *See J.L. Foti Constr. Co. v. Donovan*, 786 F.2d 714, 716-17 (6th Cir. 1986) (citing *Sumlin*, 567 F.2d at 688); *see also United States v. Shelton*, 337 F.3d 529, 537 (5th Cir. 2003) ("[T]he Fourth Amendment does not protect 'a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.'") (quoting *Hoffa v. United States*, 385 U.S. 293, 302 (1966)). An occupant who shares common authority with another understands that his "privacy is not absolute, but contingent in large measure on the decisions of another." *United States v. Chaidez*, 919 F.2d 1193, 1202 (7th Cir. 1990); *see also United States v. Morning*, 64 F.3d 531, 536 (9th Cir. 1995) (Occupant's reasonable expectation of privacy "must include the risk that a co-occupant will allow someone to enter, even if the defendant does not approve of the entry."). Thus, while *Matlock* did not specifically address the circumstance of an objecting co-occupant, the assumption of the risk rationale is equally applicable to these facts.

In *Randolph*, the Georgia Supreme Court reached a result contrary to that reached by the Colorado Court of Appeals and construed *Matlock* as invalidating third-party

consent where a co-occupant is present and objects to the search. *Randolph*, 604 S.E.2d at 837. The decision of the Georgia Supreme Court, unlike the decision of the Colorado Court of Appeals, was based on a misunderstanding of the *Matlock* opinion.

The Georgia Supreme Court cited *Matlock* as holding that "the consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared." *Randolph*, 604 S.E.2d at 837 (quoting *Matlock*, 415 U.S. at 170). But both the structure of the *Matlock* opinion and the facts presented in *Matlock* indicate its holding is much broader. Perhaps most instructive is the fact that the defendant in *Matlock* was not absent, but was present in the front yard of his home. Moreover, the *Matlock* language cited by the Georgia Supreme Court came as part of this Court's discussion of how prior caselaw contributed to its reasoning. Concluding the discussion of these cases, this Court stated its holding, which goes beyond the very limited reading adopted by the Georgia Supreme Court:

> [W]hen the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.

*Matlock*, 415 U.S. at 170. Contrary to the Georgia Supreme Court's interpretation of *Matlock*, this

unequivocal holding is not qualified by the Court's earlier reference to the "absent, nonconsenting person." *See United States v. Rith*, 164 F.3d 1323, 1328 (10th Cir. 1999).

In sum, the Georgia Supreme Court misconstrued the precedents of this Court in *Randolph*. We believe this Court should reverse the decision in *Randolph*, adopt the position of the Colorado Court of Appeals, and deny the petition for a writ of certiorari in this case.

## CONCLUSION

For the foregoing reasons, this Court should hold the petition for a writ of certiorari in this case pending the outcome of its decision in *Randolph*. If the Court reverses the decision below in *Randolph* and adopts the position of the Colorado Court of Appeals, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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